United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1553

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Index No. 67 Civ. 1137 (RJW).

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY and AETNA INSURANCE COMPANY,

Plaintiffs-Appellants,

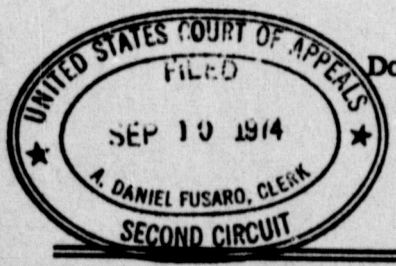
—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants-Appellees-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS ILIGAN INTEGRATED STEEL MILLS, INC., et al



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POINT I

Federal Rule of Civil Procedure 52(a) is not applicable on this appeal.

Honorable Robert Ward, unfortunately, had no opportunity to see a single witness in this case. This Court then has the same opportunity the lower Court had to ascertain

the true facts. This leaves no scope for Rule 52(a) of the Federal Rules of Civil Procedure which require "due regard" to be "given to the opportunity of the trial court to judge of the credibility of the witnesses."

The leading case in this Circuit is *Arnis* v. *Higgins*, (2 Cir., 1950) 180 Fed. 2d 537, cert den., 340 U.S. 810, where Judge Frank held on p. 539:

> "If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding."

Professor Moore in Moore's Federal Practice (2nd Ed.) Vol 5A p. 2688 says of that case:

> "Aside from the intrinsic persuasiveness of Judge Frank's opinion its theory is a natural and proper concomitant of appellate power. It probably will and should commend itself to other circuits."

See also *Kind* v. *Clark* (2 Cir., 1947) 151 Fed. 2d 36, 46.

Appellate review of the application of a legal standard is not subject to the "unless clearly erroneous" rule. *Mamiye Bros.* v. *Barber SS Lines, Inc.* (2 Cir. 1966) 360 Fed. 2d 774, 777.

Nor does the "clearly erroneous" rule apply to findings of negligence or lack of negligence. *Director General of India Supply Mission* v. *S.S. Maru* (2 Cir., 1972) 459 Fed. 2d 1370, 1373.

This Court is therefore free to reverse the lower Court's conclusion that Weyerhaeuser was not guilty of gross negligence, that its conduct was not a breach of contract and that it should not have known the storm valve in No. 3 hold was leaking.

POINT II

The testimony of Appellees' witnesses was incredible.

Captain Dumble, throughout his testimony, while he admitted that he had daily knowledge of the tremendous entry of water into the No. 3 lower hold portside and practically continuous pumping, which conditions increased for seven months up to Cristobal on the Illigan voyage and beyond, and while he admitted he never did learn the reason for the entry of the water until the ship reached Moji, Japan, tried to testify that there were any number of other causes. For example, he said he thought that the No. 3 port bilge showed water when he took aboard fresh water into the ship's tanks, yet he admitted that on the lumber voyage and on the way from Tampa to Cristobal, there was a great ingress of water into the No. 3 while the ship was not taking on fresh water. He also admitted that there were no fresh water pipes or tanks in the No. 3 or the No. 2 hold. They were all in the engine room on the other side of a watertight bulkhead and he had been told by his Marine Superintendent that it was impossible for the water to come in that way.

With regard to the lumber voyage, when the readings went to 24 inches he testified that this might have been due to sweat caused by wet lumber. But, this analysis is meaningless when he knew that the No. 3 was leaking long before the lumber voyage and on the voyage to Madras, India under conditions when there would not be any sweat.

He then said he thought that perhaps the carpenter had failed to replace the sounding cap on the weather deck but we are talking about a period of many months and this just cannot be so.

He testified that he tasted the water in the No. 3 port bilge while the ship was at Cristobal and it tasted fresh

but the fact is that he "blew out" the No. 3 lower hold and 'tween deck with 3,000 tons of trisodium phosphate. It was impossible to enter that hold. He does not explain where he got the water to taste.

His testimony that he went down into the hold to taste the water (App. 182) when it had been blown out and nobody could get in there (App. 114, 159) is enough to discredit him.

Mr. Baumgartner, Weyerhaeuser's Marine Superintendent, admitted he read the log books and that he spoke with the Captain at Baltimore personally and at Cristobal by telephone but he denied that he spoke to the Captain or communicated with him while the ship was on the east coast. Yet his testimony is that Chief Engineer Haman had ruined the main engine and had failed to fill in the Chief Engineer's log book properly on the voyage from Portland, where he began, to Baltimore, where he was fired. Inasmuch as it was the duty of Mr. Baumgartner to fire Mr. Haman, how could he do this without communicating with the Captain? And how did he know of these failures by Chief Engineer Haman without communicating with the Captain?

At one point in his testimony, Mr. Baumgartner said he did not know whether the log book was true or false in its records. This is an amazing statement by a Marine Superintendent since the log book is considered the history of the life of the ship to such an extent that it comes into evidence merely by identification.

He then testified that the log book does not say "they were pumping water." For a Marine Superintendent to even suggest that the Chief Engineer was pumping either a dry bilge well or something other than water is just hard to comprehend.

These points do not exhaust all of the inconsistencies in the ship's testimony but are merely illustrative of the kinds of things that men might say when they do not want to admit that they were grossly negligent for one reason or another, perhaps for scheduling purposes knowing that the ship must be delayed at Cristobal because of engine trouble, etc. It just proves that people will not admit that kind of conduct and Iligan never expected them to admit it, but Iligan does expect the court to find gross negligence.

POINT III

Basically the lower court erred by applying an erroneous legal standard.

While there are some erroneous findings of fact in Judge Ward's opinion, he did find that Weyerhaeuser knew before the ship broke ground that it was unseaworthy in that No. 3 hold was leaking (App. 40a, 50a) and that the No. 3 hold was reported to the Master to have 6 feet (72″) of water at Cristobal (Dumble p. 103). Appellant's cargo could have been discharged there without any damage.

The lower Court has considered this conduct as equivalent to a failure to discover any leak at all; that knowledge of a defect created no further duties either to repair or to disclose to the shipper. *This is error.*

POINT IV

Weyerhaeuser relies on documents rejected as evidence by Honorable Edward C. McLean.

Appellant takes no pleasure in asking this Court to note Weyerhaeuser's reference to and quotations from surveys admitted by Judge McLean for a limited purpose or not admitted at all.

On pages 5-6 of its brief, it relies on Exhibits "Z", "AA", "Y", "V", "W", "X", "AB", "S", "T", "R", "Q", and "P". On page 8, it refers to Exhibits "V", "W" and "X". On pages 12 and 27, it refers to Exhibit "R"; on page 24, to Exhibit "E-1" for identification; on page 24, it refers to an Exhibit it admits was never allowed in evidence.

From these documents, Weyerhaeuser asks this Court to find it regularly surveyed the ship.

Judge McLean rejected these documents as evidence, but allowed some in only because Iligan's expert had looked at them and only for cross-examination purposes. He held at Appendix page 623a:

> "The Court: '* * *
>
> Now Mr. DeBouthillier did say that in the course of his preparation for his testimony he examined certain of these reports. He was very precise in giving us the numbers and dates of the ones he examined. I think that the defendants are entitled to have those particular reports in evidence, not as proof of the truth of the contents of the reports but as constituting documents that the witness says he examined, so that they may cross examine upon it if they so desire.
>
> So I will receive for that limited purpose at this time such of these documents as the witness said he examined'."

With reference to Exhibit "E-1", from which Weyerhaeuser attempts to draw some facts, Judge McLean said, at Appendix page 345a:

> "The Court: 'So that means we give this a defendant's identification number.

Defendant Weyerhaeuser Exhibit E-1 will be the same thing as Exhibit 7 on the deposition. They go with the deposition of Mandle, which is Exhibit E, I guess.

Now Mr. Warner, will you hand the clerk these things—we are talking about the documents that are Exhibits 7 through 18, I guess, on the deposition'.

Mr. Maloof: 'These are for identification at this time'.

The Court: 'E-1 is the batch of papers that are marked No. 7 on the deposition'.

The Clerk: 'In evidence or for identification?'

The Court: 'Just for identification'."

On appendix page 346a, the Court held:

"The Court: '* * *

Then we were going to mark for identification Defendant Weyerhaeuser's Exhibits E-1, E-2, and so forth'."

It is not proper for Weyerhaeuser on this appeal to quote these documents as if they were in evidence as proof.

Judge McLean actually was astonished that Weyerhaeuser did not bring the actual surveyors to Court.

Judge Ward made the same error as Appellee (App. p. 38a) but he did at least point out that:

"Weyerhaeuser did not, however, introduce testimony from anyone actually present at the inspections who could report that they were in fact properly conducted."

There is no proof in the record of any real effort to ascertain the cause of the leak into No. 3 hold. Appellees'

best argument remains that no one reported a smell of sewage in a 22 year old ship which had, the voyage before, carried a full load of fertilizer to India. See the comments of Judge McLean at App. pp. 764a and 765a on this point and on the progressive nature of the leak.

POINT V

New York Navigation was not the carrier and is not entitled to the United States Carriage of Goods by Sea Act.

New York Navigation calls itself a time charterer although it chartered the John Weyerhaeuser for one voyage, because it employed a time charter form (App. 391). It refers then to Clause 2 of the bill of lading (App. 14) which identifies "carrier" as the time charterer, among others, "if bound hereby".

But by its own demise clause in clause 1 of the bill of lading (App. 14) it is set forth that New York Navigation is not bound by the bill of lading and is only an agent.

It is therefore not the carrier by its own agreement. That being so it also never intended that it should have the benefits of Clause 17 of the bill of lading (App. 16) as that applies only to the carrier.

And regardless of the above, New York Navigation does not have the benefits of the United States Carriage of Goods by Sea Act because as between Iligan and New York Navigation the bill of lading was not the contract of carriage. At the most, its terms, insofar as consistent with the original agreement, are part of a contract of carriage.

CONCLUSION

Neither Weyerhaeuser nor New York Navigation are entitled to the package limitation: the judgment should be modified to hold each appellee liable to Iligan for its full damages to be proved before a commissioner.

Respectfully submitted,

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